(2)

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

No. 96-793

In The
Supreme Court of the United States

October Term, 1996

CORTEZ BRIDGES,
Petitioner

versus

CITY OF BOSSIER,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Kenneth Mascagni
Counsel of Record
Robert Kennedy, Jr.
Cook, Yancey, King & Galloway
A Professional Law Corporation
1700 Commercial National Tower
333 Texas Street
P. O. Box 22260
Shreveport, LA 71120-2260
Telephone (318) 221-6277

Counsel for Respondent

24 pp

QUESTION PRESENTED FOR REVIEW

Does the single, particular job of firefighter constitute a "class of jobs" such that a perceived disqualification from this single job constitutes a substantial limitation to the major life activity of working?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 6

A. Course of Proceedings and Disposition of the Case Below 6

B. Correction of Misstatements in the Petition 7

REASONS FOR DENYING THE WRIT 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Case Law

Bridges v. City of Bossier,
92 F.3d 329 (5th Cir. 1996) 7-10, 13, 15, 16

Byrne v. Board of Educ.,
979 F.2d 560 (7th Cir. 1992) 12, 15, 16

Chandler v. City of Dallas,
2 F.3d 1385 (5th Cir. 1993) 11, 15

Cook v. State Of R.I., Dept, of MHRH,
10 F.3d 17 (1st Cir. 1993) 15

Daley v. Koch, 892 F.2d 212
(2nd Cir. 1989) 15, 16

Ennis v. National Ass'n Of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995) 11

Fitzpatrick v. City of Atlanta,
2 F.3d 1112 (11th Cir. 1993) 16, 17

Freund v. Lockheed Missiles And Space Co., Inc., 930 F.Supp. 613
(S.D. Ga. 1996) 17

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed.2d 672 (1949), *reh'g granted*, 337 U.S. 910 (1949) 12

Gupton v. Com. Of Va., 14 F.3d 203 (4th Cir. 1994) 15

Heilweil v. Mt. Sinai Hospital, 32 F.2d 718 (2nd Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1095, 130 L.Ed.2d 1063 (1995) 11, 15

Immigration & Naturalization Serv. v. Bagamasbad, 429 U.S. 24, 97 S.Ct. 200, 50 L.Ed.2d 190 (1976) 6

Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) 16

Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1255, 122 L.Ed.2d 653 (1993) 15, 16

Miller v. AT&T Network Sys., 915 F.2d 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989) 15

Rogers v. International Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996) 11

Roth v. Lutheran General Hospital, 57 F.3d 1446 (7th Cir. 1995) 15, 16

Welsh v. City of Tulsa, Okl., 977
F.2d 1415 (10th Cir. 1992) 11, 12, 15, 16

Wernick v. Federal Reserve Bank Of New York,
91 F.3d 379 (2nd Cir. 1996) 15

Wooten v. Farmland Foods, 58 F.3d 382
(8th Cir. 1995) 15, 16

Statutes

28 U.S.C. §1254(1) 2

29 C.F.R. § 1630.2(j)(3)(i)&(ii) 4, 13-15

42 U.S.C. § 12102 2

42 U.S.C. § 12111 3

42 U.S.C. § 12112 4

United States Supreme Court Rule 15.1 7

No. 96-793

In The Supreme Court of the United States

October Term, 1996

CORTEZ BRIDGES,
Petitioner

versus

CITY OF BOSSIER,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 92 F.3d 329 (5th Cir. 1996). The unreported opinion of the United States District Court for the Western District of Louisiana is reproduced in Appendix B of the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

Americans With Disabilities Act

Title 42, Chapter 126

42 U.S.C. § 12102. Definitions

As used in this Chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential,

and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Regulations of the Equal Employment Opportunity Commission

29 C.F.R. § 1630.2(j)(3)(i)&(ii)

(j) *Substantially limits* --

* * *

(3) With respect to the major life activity of *working* --

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

On March 2, 1994, petitioner filed suit against the City of Bossier City ("the City") under the Americans With Disabilities Act ("ADA"). After a three day trial on the merits and the submission of post-trial briefs, Judge Tom Stagg issued a written opinion dismissing petitioner's ADA claim because petitioner failed to carry his burden of proving that the City regarded him as having a substantially limiting impairment. Because petitioner's failure to prove the threshold element of "disability" was decisive, the trial court properly reserved ruling on the other relevant issues presented by the case.[1]

On July 25, 1995, petitioner timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. In addition to the briefs submitted on behalf of the parties, the United States filed an amicus curiae brief. A panel of the Fifth Circuit affirmed the district court's judgment in favor of the City.

Petitioner timely filed a petition for writ of certiorari.

---

[1] *See Immigration & Naturalization Serv. v. Bagamasbad*, 429 U.S. 24, 25-26, 97 S.Ct. 200, 201, 50 L.Ed.2d 190 (1976).

B. Correction of Misstatements in the Petition.

The opinions of the court of appeals and the trial court correctly set forth the facts of this case. In the interest of making this brief truly brief, respondent respectfully directs the Court's attention to the opinions of the appellate court and the trial court.

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of fact contained in the petition to the Court's attention.

Petitioner misrepresents to this Court both the nature of the work which he sought, and the effect of petitioner's rejection by the City. In direct contrast to petitioner's statement that he "sought work as a paramedic with Bossier City, La.," (see Petition, p.4)[2] both the court of appeals and the trial court correctly found that petitioner applied for the position of firefighter with the City. *Bridges v. City of Bossier*, 92 F.3d 329, 331 (5th Cir. 1996); (Memo.R., Petition, A-13). In fact, petitioner testified that he applied for, and would have only accepted, a job with the Bossier City Fire

---

[2] "Petition, p. __" refers to page numbers in the Petition for Writ of Certiorari. "Memo.R., Petition, A-_" refers to the Memorandum Ruling rendered by Judge Stagg on June 30, 1995 which is reproduced as Exhibit B of the Petition for Writ of Certiorari.

Department as a front-line fire fighter. (5/10/95 Tr. 20, 101).[3]

Petitioner also claims that his rejection as a firefighter precluded his employment as a paramedic. (Petition, p.4). In fact, petitioner was employed as a paramedic at the time of the trial in this matter. *Bridges*, 92 F.3d at 335 n.9 (". . . Bridges is currently employed as an EMT."); (Memo.R., Petition, A-14). Rather than precluding petitioner's employment as an EMT and paramedic, his rejection by the City merely precluded him from employment by the City at the single, particular job of firefighter/emergency medical technician.[4]

---

[3] "_ Tr. _" refers to pages in the trial transcript for the dates indicated. The transcript for May 11, 1995 was separated into two volumes: a morning session and an afternoon session. The morning session of 5/11/95 will be referred to as "5/11/95 Mrn. Tr. _" and the afternoon session of 5/11/95 will be referred to "5/11/95 Aft. Tr. _."

[4] As noted by the court of appeals, the City has a rule requiring all EMTs to be firefighters. *Bridges*, 92 F.3d at 335 n.9. This rule was implemented for two reasons. First, the City wants all EMTs and firefighters to be dually qualified. In emergency response, the firefighter/EMT will have the training necessary to protect both life and property. Second, the City believes that the Fair Labor Standards Act allows employers to require firefighters (and EMTs who are also firefighters) to work 56-hour weeks without overtime pay. *Id.*

As he did in the lower courts, petitioner continues to allege that he was denied a position as a firefighter without any kind of individualized evaluation of his ability to do the job. (Petition, p.6). The record, however, is replete with evidence of the individualized assessment performed by the City. (5/11/95 Aft.Tr. 29-41, 49, 58-9, 80-88). This argument was dismissed implicitly by the trial court and expressly by the court of appeals. *Bridges*, 92 F.3d at 331 n.1.

Petitioner's argument to this Court is premised primarily upon two factual assertions, both of which are contrary to the findings of the district court (which were affirmed by the court of appeals) and have virtually no support whatsoever in the record. The first of these unsupported factual assertions is that the City perceived petitioner as being unqualified for the positions of EMT and paramedic, as well as firefighting. According to petitioner, "the City regarded Bridges . . . to be unqualified for any line position in the fire department including firefighter, EMT, paramedic or, indeed any position with exposure to trauma." (Petition, p.7).

In fact, the City only perceived petitioner as being unqualified for the single position of firefighting. The trial judge rendered a specific finding of fact with regard to this very issue.

> The evidence demonstrated that the City acted because it considered his condition prevented plaintiff from working in the one position he sought, firefighter.

(Memo.R., Petition, A-19). After reviewing the record, the court of appeals concurred with the trial court, explaining that there was absolutely no evidence that the City perceived petitioner as disqualified to work as an EMT or paramedic. *Bridges*, 92 F.3d at 335 n.9.

Based on this single finding of fact, the trial court concluded that, while the City's perception would also preclude petitioner from employment in any job involving "routine exposure to extreme trauma," such jobs would only constitute a "narrow range of jobs." (Memo.R., Petition, A-19). This fact specific finding was based on the absence of any evidence that even a single job other than that of a firefighter involves "routine exposure to extreme trauma." *Bridges*, 92 F.3d at 333-34 & n.5.

Second, petitioner assumes that employment involving routine exposure to extreme trauma includes any kind of emergency response work. (Petition, p.10 ("The rationale for his disqualification -- exposure to trauma and thus to excessive bleeding -- if applied by other employers would certainly disqualify him from all firefighting, and emergency-response related work.")). However, as noted by the court of appeals, there was no record evidence that law enforcement personnel, EMTs and paramedics, or any other emergency response-related workers are "routinely exposed to extreme trauma." *Bridges*, 92 F.3d at 333-34 & n.5.

Simply stated, the factual basis from which the rulings of the lower courts are based identify only one

job which involves routine exposure to extreme trauma. That job is the singular job described in detail by the lay testimony of the City's firefighter -- the unique job of firefighter/EMT in the Bossier City Fire Department.

Petitioner also complains that the trial judge never reached the "essential question" of whether petitioner's condition in fact disqualified him for the position because the trial court concluded as a matter of law petitioner was not disabled within the meaning of the ADA. (Petition, p.9). First, the threshold question in any case brought pursuant to the ADA is whether the plaintiff is an individual with a disability. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). The plaintiff has the burden of proving that he has a physical impairment that substantially limits a major life activity. *Heilweil v. Mt. Sinai Hospital*, 32 F.2d 718, 722 (2nd Cir. 1994), *cert. denied*, __ U.S. _ , 115 S. Ct. 1095, 130 L.Ed.2d 1063 (1995); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992).

Second, in accordance with the admonitions of several appellate courts,[5] the decision of the trial court,

---

[5] Whether or not a particular person has an impairment which substantially limits a major life activity or is perceived by a covered entity as having an impairment which substantially limits a major life activity is an individualized inquiry best suited to a case-by-case determination. *Ennis v. National Ass'n Of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385,

rather than a purely legal conclusion, was based on a fact specific individualized inquiry in which the trial court considered whether this petitioner's particular impairment constituted for this petitioner a significant barrier to employment. According to the trial court, the evidence demonstrated that this petitioner had failed to prove that his particular impairment constituted a significant barrier to employment for him.

REASONS FOR DENYING THE WRIT

The decisions of the trial court and the court of appeals rest largely on: (1) the trial court's finding (which was affirmed by the court of appeals) that the City perceived petitioner as being unqualified only for jobs involving routine exposure to extreme trauma; and (2) the absence of any record evidence demonstrating the existence of any job other than that of firefighting which involves routine exposure to extreme trauma. Findings of fact by the trial court, which are affirmed on appeal, present no issue deserving of this Court's attention. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed.2d 672 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent

---

1396 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Byrne v. Board of Educ.*, 979 F.2d 560, 564-65 (7th Cir. 1992); *Welsh*, 977 F.2d at 1417.

findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

As thus tried and decided below, this case presented the lower courts with the issue of whether petitioner's limitation as perceived by the City -- that petitioner cannot perform any job in which he is routinely exposed to extreme trauma -- constituted a substantial limitation on the major life activity of working. This issue "is a mixed question of fact and law. The underlying factual question is how many and which jobs involve routine exposure to extreme trauma." *Bridges*, 92 F.3d at 333. As found by the lower courts, the record evidence establishes only that the single job of firefighter involves routine exposure to extreme trauma. *Id.* at 333-34 & n.5.

Under the established facts of this case, two legal issues were presented to the court of appeals. The first legal issue was whether the City's perception that petitioner could not perform any job involving routine exposure to extreme trauma would disqualify petitioner from a "broad range of jobs." See 29 C.F.R. § 1630.2(j)(3)(i).[6] Petitioner does not raise this issue in the instant petition.

The second legal issue, the one in fact raised by the instant petition, is whether the City's perception that petitioner could not perform any job involving routine

---

[6] In fact this was the only issue addressed by the trial court.

exposure to extreme trauma would disqualify petitioner from a "class of jobs." See 29 C.F.R. § 1630.2(j)(3)(i). The regulations define a "class of jobs" as those jobs requiring the same "training, knowledge, skills or abilities." 29 C.F.R. 1630.2(j)(3)(ii)(B).

As demonstrated above, there is no record evidence to establish that any job other than that of firefighter involves routine exposure to extreme trauma. Likewise, there is no record evidence establishing what, if any, jobs require "training, knowledge, skills, or abilities" similar to that required of a firefighter.[7] Thus, the legal issue presented to this Court may be succinctly stated as follows:

> Does the single, particular job of firefighter constitute a "class of jobs" such that a perceived disqualification from this single job constitutes a substantial

---

[7] The issue of whether the City's perception -- that petitioner could not perform any job involving routine exposure to extreme trauma -- would disqualify petitioner from a "class of jobs" was not raised by the petitioner in the trial court. Accordingly, there is no record evidence concerning jobs involving similar "training, knowledge, skills or abilities." When this issue was first raised by the amicus curiae in its initial brief, the City objected to that the argument as untimely. The court of appeals held that the purely legal issue of whether firefighting -- including firefighters and associated municipal paramedics and EMT's who must also serve as backup firefighters -- constituted a "class of jobs" had not been waived by petitioner.

limitation to the major life activity of working?

The regulations specifically address this very issue. According to the regulations, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Furthermore, the courts of appeals which have actually addressed this issue are in agreement. *See Bridges*, 92 F.3d at 335; *Wernick v. Federal Reserve Bank Of New York*, 91 F.3d 379, 383-84 (2nd Cir. 1996); *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454-55 (7th Cir. 1995); *Heilweil*, 32 F.3d at 723; *Gupton v. Com. Of Va.*, 14 F.3d 203, 205 & n. 3 (4th Cir. 1994) (in order for plaintiff to establish that he has an impairment that substantially limits his ability to work, he must show more than merely that the impairment barred him from one particular job; *Cook v. State Of R.I., Dept, of MHRH*, 10 F.3d 17, 26 (1st Cir. 1993); *Chandler*, 2 F.3d at 1393 ("An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation in his ability to work in general."); *Byrne*, 979 F.2d at 565; *Welsh*, 977 F.2d at 1417; *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1255, 122 L.Ed.2d 653 (1993); *Miller v. AT&T Network Sys.*, 915 F.2d 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir. 1989);

Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.3 (6th Cir. 1985).

Likewise, the courts are in agreement that one is not substantially limited in the major life activity of working even though that single, particular job is "the job of one's choice." *Bridges*, 92 F.3d at 335; *Wooten*, 58 F.3d at 385-86; *Roth*, 57 F.3d at 1454-55; *Byrne*, 979 F.2d at 1417; *Welsh*, 977 F.2d at 1417; *Maulding*, 961 F.2d at 698; *Daley*, 892 F.2d at 215.

Only the Eleventh Circuit has suggested a different result. In *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993), the plaintiffs were barred from serving as firefighters because they had a skin condition that prevented them from shaving, and the fire department had, for safety reasons, a no-beard rule. In dicta, the court stated that the "firefighters would seem to qualify as handicapped individuals" under the Rehabilitation Act because their skin condition "substantially limit[ed their] ability to . . . work on account of the no-beard rule." *Id.* at 1126.

However, the dicta of *Fitzpatrick* has not even been followed by the district courts of the Eleventh Circuit. As observed by one district court:

> The Eleventh Circuit has not made any substantive ruling on whether the inability to perform a specific individualized job amounts to a substantial limitation of a major life activity under the ADA.[1]

> Nevertheless, the Court is persuaded by the opinions of the numerous other circuits which have decided this issue. An impairment that only disqualifies a person from a narrow range of jobs should not be considered substantially limiting.
>
> > 1. *In dicta*, the Eleventh Circuit has stated that the inability to work at a particular job because of an impairment may qualify a person as a handicapped individual. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1126 (11th Cir. 1993). The *Fitzpatrick* decision, however, offers little assistance in determining how the Eleventh Circuit would rule on the case at bar. . . .

Freund v. Lockheed Missiles And Space Co., Inc., 930 F.Supp. 613, 617 (S.D. Ga. 1996).

In summary, this case does not present a legal issue which warrants the commitment of this Court's scarce judicial resources. When petitioner's misstatements of fact are corrected, this case presents a simple straightforward legal issue: Does the perceived inability to perform a single, particular job constitute a substantial limitation in the major life activity of working. More importantly, the answer by the courts of appeals to this legal issue -- that the inability to perform

a single, particular job does ***not*** constitute a substantial limitation in the major life activity of working -- has been unanimous.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

Kenneth Mascagni
Counsel of Record
Robert Kennedy, Jr.
Cook, Yancey, King & Galloway
A Professional Law Corporation
1700 Commercial National Tower
333 Texas Street
P. O. Box 22260
Shreveport, LA 71120-2260
Telephone (318) 221-6277

COUNSEL FOR RESPONDENT